No. 2790.

United States Circuit Court of Appeals, Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

THE SOUTHERN PACIFIC COMPANY, DEFENDANT IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

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IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION,

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This suit was instituted by the United States against the Southern Pacific Co. to recover penalties for violations of the act of Congress commonly known as the Federal hours-of-service law (34 Stat. L., 1415). The complaint consisted of 30 counts involving the service of five train crews each of which consisted of six employees.

Counts 1 to 6, inclusive, relate to the service of the train crew of extra 2784 from Los Angeles to Indio, in the State of California, on February 2, 1914, the service being from 5 a. m. to 9.50 p. m. on said date.

Counts 7 to 12, inclusive, relate to the service of the train crew of extra 2765 from Indio to Los Angeles, in the State of California, on February 27, 1914, the service being from 3.10 a. m. to 8.40 p. m. on said date.

Counts 13 to 18, inclusive, relate to the service of the train crew of No. 242, eng. 2549, from Los Angeles to Palm Springs, in the State of California, on February 24, 1914, the service being from 1.30 a. m. to 6.50 p. m. on said date.

Counts 19 to 24, inclusive, relate to the service of the train crew of 1/242, eng. 2617, from Los Angeles to Indio, in the State of California, on March 8, 1914, the service being from 1.55 a. m. to 7 p. m. on said date.

Counts 25 to 30, inclusive, relate to the service of the train crew of No. 516, eng. 2711, from Los Angeles to Indio, in the State of California, on March 12, 1914, the service being from 7.30 p. m. on said date to 12.25 p. m. on March 13, 1914.

The defendant's answer and special amended answer raises these defenses:

Employees in question were not on duty in excess of 16 hours, because in each case there was a release from duty at Colton sufficient to bring the service within a total of 16 hours.

As to counts 7 to 12, inclusive, there was a special answer not alleging any delay to the particular train of which the employees specified in these counts were the crew, but alleging "that any delay which occurred in the operation of the trains mentioned * * *

could not have been foreseen or guarded against by the defendant company because of the fact that it could not be ascertained at any given point on said track the length of time which would be consumed in reaching another given point." (Rec., p. 122.)

To the defendant's second amended answer the Government filed a demurrer. (Rec., p. 121.) The record does not show any action taken by the court on this demurrer. Colloquy relating thereto. (Rec., p. 186.) Assignment No. 3 of the assignments of error recites that the court erred in *overruling* plaintiff's demurrer to defendant's second amended answer. (Rec., p. 214.)

The case was heard by the court and jury on stipulation (Rec., p. 143) and evidence (Rec., pp. 147 to 197, inc.).

The plaintiff requested 13 special instructions (Rec., pp. 205 to 209), to the refusal of each of which exception was duly taken.

Verdict was for the defendant.

STIPULATION AND EVIDENCE.

The following stipulation of facts was entered into and agreed upon:

> It is hereby stipulated and agreed between the parties in the above-entitled cause that the defendant is and was at the times involved in the Government's declaration a corporation organized and doing business under the laws of the State of Kentucky, and a common carrier engaged in interstate commerce by railroad in the State of California.

That the trains involved in the 30 counts of the Government's declaration were, on the dates alleged, engaged in the movement of interstate commerce.

As to counts 1 to 6, inclusive, it is stipulated that the employees, made the basis of said counts, and whose names are set forth therein, went on duty in the service of the defendant company at 5 a. m. on February 2, 1914, in charge of said defendant's train, Extra 2784, and that said employees in charge of said train proceeded with said train from Los Angeles, Cal., to Indio, in said State, at which latter point said employees were by the defendant released at the hour of 9.50 p. m. of said date; that said employees at the station of Colton, Cal., were by the defendant given what was at that time designated by the defendant a release of 1 hour and 30 minutes; that with the exception of said 1 hour and 30 minutes said employees were on duty continuously on said date from the hour of 5 a. m., to the hour of 9.50 p. m.

With respect to counts 7 to 12, inclusive, it is stipulated that the employees, made the basis of said counts, and named in said counts of the Government's declaration, were on the 27th day of February, 1914, by the defendant, placed in charge of defendant's train, Extra 2765, running from Indio, in the State of California, to Los Angeles, in said State, and the said crew, on said date, did operate defendant's train between said points; that the said crew reported for duty at Indio, Cal., at 3.10 a. m. on said date and were finally

relieved from duty by the defendant at 8.40 p. m. on said date at Los Angeles, Cal. At the station of Colton, on said date, the said crew in charge of Extra 2765 were by the defendant given what was designated by said defendant at said time a release of 1 hour and 30 minutes; that with the exception of the time of said designated release the said crew were continuously on duty from said hour of 3 a. m. on said date to the hour of 8.40 p. m. on said date.

As to counts 13 to 18, inclusive, it is stipulated that the employees named therein, and made the basis of said counts, were by the defendant placed in charge of said defendant's freight train No. 242, engine No. 2549, on February 24, 1914; that said train crew in charge of said train were connected with the movement of said train from Los Angeles, in the State of California, to Palm Springs, in said State; that said train crew reported for duty and began service at the hour of 1.30 a. m. on said date at Los Angeles, Cal., and were relieved from duty by the defendant at 6.30 p. m. on said date at Palm Springs, in the State of California; that said defendant on said date gave said crew at Colton, Cal., what was designated at said time by said defendant a release of 1 hour and 20 minutes; that with the exception of the time of said designated release said employees of said defendant in charge of said train were on continuous duty from the hour of 1.30 a. m. on said date to the hour of 6.30 p. m. on said date.

As to counts 19 to 24, inclusive, it is stipulated that the employees named therein, and made the basis of said counts, were by the defendant on the 8th day of March, 1914, placed in charge of defendant's freight train 1/242, engine 2617, and said employees while in charge of said train conducted said train from the station at Los Angeles, Cal., to the station of Indio, in said State; that said employees went on duty on said date in charge of said train at the hour of 1.35 a. m. at Los Angeles, Cal., and were by the defendant relieved at Indio, in said State, at the hour of 7 p. m., on said date; that said crew at the station of Colton, Cal., were by the defendant given what was at that time designated by the defendant a release of 1 hour and 20 minutes; that with the exception of said release of 1 hour and 20 minutes the said crew in charge of said train on March 8, 1914, were in continuous service from the hour of 1.55 a. m. to the hour of 7 p. m. on said date; that with the exception of said period of release at Colton, Cal., on said date, said crew were in continuous service in charge of said train from the hour of 1.55 a. m. to the hour of 7 p. m. on said date.

With respect to counts 25 to 30, inclusive, it is stipulated that the employees named in said counts and made the basis of said counts were by the defendant placed in charge of defendant's freight train 516, engine 2711, on the 12th day of March, 1914, and that said employees on said date, and the following day of March 13, 1914, conducted said train from the station of Los Angeles, Cal., to the station

of Indio, in said State; that at the hour of 4.20 p. m. on the 13th day of March aforesaid, when said crew were at Colton, in the State of California, they were by the defendant given what was designated by said defendant on said date a release of one hour; that with the exception of said period of release said employees were in continuous service on said date from the hour of 7.30 p. m. on March 12, 1914, to the hour of 12.25 p. m. on March 13, 1914.

It is further stipulated that the parties to the above-entitled cause reserve the right to introduce any further testimony relative to what occurred on said dates at Colton, Cal., with respect to all the facts and circumstances surrounding the aforesaid designated releases of said crews on said dates.

It is further stipulated between the parties hereto and to be considered as applying to each and every count in plaintiff's petition that during the aforesaid periods of release at Colton said train crews were not in any way called upon and did not perform any duties in connection with their service in the movement of their said train.

The carrier's trains through Colton were stopped at Colton and the train and engine crews relieved for the length of time covered by the necessary detention at Colton. The record does not show in all instances the real cause of the detention of trains at Colton, but there is mention made of the fact that refrigerator cars are held there for "icing" and that there is switching and making up and breaking up of trains done there. None of this local work is done,

however, by the train or engine crews bringing trains into Colton.

No other distinction is made between the work done at Colton than at other way stations where cars are taken out of and put into trains. That there is quite extensive work there in switching out of and into trains at this place may be inferred from the facts recited in the record.

To cover the time of detention at this place, the superior officers who testified point out that the practice is to release crews "until called." Whenever a crew is needed to resume its journey a call boy is sent out to recall them.

As to these releases the testimony is as follows:

> The yardmaster at Colton gave us our release.
>
> Either the yardmaster or the operator on duty.
>
> When the yardmaster gave us our release he usually says: "You are released for two hours," or more, whichever it might be, whichever was the case.
>
> It is a verbal release.
>
> I do not remember the form of the expression used on this particular day.
>
> It is very seldom the practice to give a release for any indefinite period, although they would do so at times, and in case of an indefinite release the form of release would be, "You are released for a call." I do not think this was the form of release on this particular day, but I am not certain.

As near as I can remember on this particular day, after I got my release I went over on Front Street and got lunch, after which I came back to the yard and went to the caboose. (Rec., p. 159.)

We were at all times supposed to be within calling distance, and for that reason during these releases I would stay within calling limits, which, I believe, is 1 mile. (Rec., p. 160.)

I do not remember what our crew did on that day at Colton, but if we were released for an hour or an hour and a half or two hours, we certainly didn't do a thing in regard to the work for the time that we were released for. (Rec., p. 162.)

The yardmaster or operator on duty at the time gave me that order, and, as near as I can remember, all he said was, "You are released for one hour," or "two hours" as the case might be. (Rec., p. 163.)

On our arrival at Colton we go in and register in the train register and also turn the waybills of the cars in the train over to the trainmaster, and he personally notified me that I would be released until called. When I arrived at Colton—there is always more or less delay there, that is the eating station—and on arrival there I, as well as most of the men, go in and say, "Well, what is the dope? How long do you think we will be here?" That, so that we will know how much time we will have to eat. If he sees there is quite a bit of delay, he says, "You are released until called to finish the trip." I was released there

this day for an hour and 30 minutes. When I was recalled, I was called to finish the trip to Indio, eastbound. (Rec., pp. 166, 167.)

I was relieved for an hour and 30 minutes at Colton, but I don't remember the terms of that release. It meant that we were to be released, the watchman would take charge of the engine and we were to get off and stay away from the engine until the time was up, unless they called me. It released me from continuing the journey on 242 unless they notified me to come on. (Rec., p. 170.)

I say I don't know whether I was released for a definite period or not. If I was, I would be back at the roundhouse, but I don't remember the exact time. I wouldn't be positive whether I was released for a definite period on February 24, 1915, (?) with respect to train 242, engine 2549, unless I could see some reports. It might have been a release until I was called, or a release for a definite time. (Rec., p. 173.)

These employees were released for a period of 1 hour and 30 minutes at Colton on that day. (February 2, 1914.) The purpose of that release was to give them a rest. We did not need them there while we were doing the work. If we had not released them, the hours of service would have continued. If they had not been released under the form that they were released, they probably would not have reached their destination within the 16 hours. When the release was given it was not given with the anticipation, necessarily, that the crew might not reach their destination within

16 hours. We did not need them and so we gave them their freedom. That is true with regard to all these crews on these trains. *All of these employees were paid for the time that they were released at Colton.* (Rec., pp. 173–174.)

That crew on that day (March 12, 1914) proceeded to Indio and were released at Colton for an hour and thirty minutes. That meant that they were absolutely released from responsibility. I did not hear any of them testify here to-day that they were released for a definite time. When they are released they can do anything they see fit. When released they would probably say, "You will find me at such and such a place. I will be down at the bunk house or at the hotel or getting lunch." At the expiration of 1 hour and 30 minutes they are told, "You are released." They will say, "All right; I am going down and get some sleep," or "All right; I am going over to the lunch counter, and you will find me there when you want me." *When these men were released they did not know when they would be called again.* They might not be called for two hours or they might be called within an hour. The form is, "You are released." That means that he is released from responsibility *until called.* It may be a release for 30 minutes—any length of time. We have released them for a period as short as 20 minutes. When a man is released, when he is notified he is released, he doesn't know anything more than that he is released. As far as I know, that is true in regard to all these men involved in

> this case, and I am justified in saying that from my own knowledge in the usage in the transportation business. When these men were released for an hour and thirty minutes in these particular cases, that meant that they were released, that they were as free men as there is in the world, until the call boy gets them again. (Rec., pp. 175–176.)

If these men had gone and taken an automobile ride we would call somebody else if we could not find them. If these men had gone and taken an automobile ride and notified the man in charge that they would be found 25 miles out within an hour, we would not be able to get these men back at any minute if we wanted them in 10 minutes, and if they were not there and they were not able to get them within the time needed we would call somebody else. If nobody else was available, there would be a delay. Of course those are impossible conditions. Yet the men have a right to go but they would not lose their jobs. They would not be subject to suspension. We would take them to task about it. It would be a careless way to do, to go out in the country without saying where they would be. They should say, "I will be at such and such a place at such a time." If they were 50 miles away at such a time it would not be satisfactory to the railroad company. *They should be where they could be called when wanted.* This release is a matter of common sense. They are told "Now you are released," and they say, "We will be found at such a place." The man wants to work, you know, he wants to do more work and the

railroad company wants him, too, and the railroad company *wants him* to be where he is *accessible when needed* and wants him to tell them he will be there. (Rec., 178.)

> Q. What was the system of release at Colton followed by the Southern Pacific Co. during February and March of last year (1914)?
>
> A. (Mr. Sloan, assistant superintendent). They were released from duty on their arrival *until they were called* to leave.
>
> Q. Until they were called?
>
> A. Yes; "Released until called" meant that they understood they were off duty. That they are not in any way employed. They are absolutely free. And they would be *called when they would be needed*, just the same as for their initial trip. *The release was for an indefinite period.* With regard to the crew running from Los Angeles to Indio, when that crew got to Indio it was released. With regard to the crew running from Indio to Los Angeles, when they arrived at Los Angeles they were released. They are at their terminal. They are through. The crews would *not* be paid for their release *at Indio*, because that is their *terminal* and would *not* be paid for their release at *Los Angeles* because that is their *home terminal*, but *they are paid for their release at Colton. They are paid for every minute they are at Colton. That is between their terminals. That is because they had not reached their destination.* The *release* at *Colton differed* from the *releases* at their *terminals* in this: *At*

Colton they are at the middle of their run. At their terminals they are at home. They go home just like you go home when you get through your work, when at Colton they are only released from duty. (Rec., pp. 181–182.)

It was very often the case at that time that the time used from Los Angeles to Indio or Indio to Los Angeles was very near the 16-hour period. If the time allowed at Colton should not be counted, the time of duty of these crews in a number of cases would have been in excess of 16 hours. It was an order that the crews be released. That was the system. We always released those crews at Colton. (Rec., p. 185.)

Regarding counts 7 to 12, inclusive, the following testimony was had over the objection of the plaintiff:

The train left Indio for Los Angeles on February 27, at 3.10 a. m., and was tied up at Los Angeles at 8.40 p. m. of that day. I do not know of anything that occurred subsequent to the departure of that train from Indio that affected its movement, except track conditions, and the condition of the track was known at the time the crew left the terminal, in a general way, but the condition of the track was not such that we could tell the exact running time. (Rec., p. 193.)

The heaviest rains fell at Los Angeles, for instance, according to the Weather Bureau records, February, 1914. There were 4.26 inches fell on the 18th of February; 0.94 inch on the 19th; 1.69 on the 20th; 0.15 on the 21st; none on the 22d; none on the 23d; and none for the balance of the month. (Rec., p. 195.)

The flow of the river on the 17th of February, the day prior to the rain, was 282 cubic feet per second; on the 18th it was 1,750—that is the day of the big rain; on the 19th, 4,540; on the 20th, 11,800; on the 21st, 8,480; on the 22d, 6,620; on the 23d, 4,710; on the 24th, 4,180; on the 25th, 2,950; on the 26th, 2,840; on the 27th, 2,500; on the 28th, 2,200. That is, cubic feet per second. A cubic foot per second is 50 miner's inches. That was a very unusual flow for that stream. (Rec., p. 197.)

The flow was heaviest on the 20th, and it gradually reduced down until the 28th. On the 27th it was 2,500 cubic feet per second. The condition of the stream was much better on the 27th than on the 20th. (Rec., p. 197.)

Statute (34 Stat. L., 1415):

An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the

United States. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than 16 consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for 16 hours he shall be relieved and not required or permitted again to go on duty until he has had at least 10 consecutive hours off duty; and no such employee who has been on duty 16 hours in the aggregate in any 24-hour period shall be required or permitted to continue or again go on duty without having had at least 8 consecutive hours off duty: *Provided*, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than 9 hours in any 24-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than 13 hours in all towers,

offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a 24-hour period on not exceeding 3 days in any week: *Provided further,* The Interstate Commerce Commission may, after full hearing in a particular case and for good cause shown, extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

SEC. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: *Provided,* That the provisions of

this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: *Provided further*, That the provisions of this Act shall not apply to the crews of wrecking or relief trains.

SEC. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act.

SEC. 5. That this act shall take effect and be in force one year after its passage.

Approved, March 4, 1907, 11.50 a. m.

QUESTIONS INVOLVED.

1. IN SUSTAINING THE BURDEN OF PROOF OF THE CARRIER WHERE SERVICE OF A TRAIN CREW IN EXCESS OF 16 HOURS IN A 24-HOUR PERIOD IS ESTABLISHED AND DEFENDANT RELIES ON THE CASUALTY PROVISO FOR A DEFENSE, IS IT NECESSARY FOR THE CARRIER TO SHOW A CAUSAL CONNECTION BETWEEN THE CASUALTY, UNAVOIDABLE ACCIDENT, OR ACT OF GOD RELIED ON AND THE DETENTION ON DUTY OF SUCH TRAIN CREW?

2. WHERE THE CASUALTY PROVISO IS RELIED ON AS A DEFENSE IS IT NECESSARY FOR THE CARRIER TO SHOW THAT COMPLIANCE WITH THE OBLIGATION FIXED BY EXPRESS WORDS OF THE STATUTE TO RELIEVE EMPLOYEES AT THE EXPIRATION OF 16 HOURS'

Service, has been Prevented by an Excusable Cause?

3. May the Period of 16 Hours' Duty of a Train Crew Between Terminals be Extended by a Carrier by Giving to Such Crew Short Releases not Exceeding an Hour and a Half to Cover the Time it is Foreseen that Such Crew May be Detained at a Way Station from any of the Usual Causes of Railroad Operation.

4. Are Such Releases Operative to Diminish Time on Duty Where the Crew Is at All Times during Such Release Subject to Immediate Recall if Required by the Carrier?

5. Are Such Releases between Terminals To Be Regarded as Time Off Duty Where the Employees Are Paid for the Time Covered by Such Release?

6. Where Conditions Resulting from a Cause Covered by the Casualty Proviso are Known When a Train Crew Leaves a Terminal, May Excess Service of Such Crew Be Justified Under the Proviso?

I.

In Sustaining the Burden of Proof on the Carrier Where Service of a Train Crew in Excess of 16 Hours in a 24-Hour Period Is Established and Defendant Relies on the Casualty Proviso for a Defense, Is It Necessary for the Carrier to Show a Casual Connection between the Casualty, Unavoidable Accident,

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OR ACT OF GOD RELIED ON AND THE DETENTION ON DUTY OF SUCH TRAIN CREW?

The mere happening of a casualty, unavoidable accident, or act of God during a trip does not call into effective operation the casualty proviso as an excuse for excess service of a train crew. The excess service must have been caused by such casualty. It must have been a necessary and unavoidable result thereof. It goes without saying that Congress never intended to excuse service in excess of the standard fixed unless the justification specified in the proviso was the necessary cause of such excess service.

That the excess service must be the "*direct result*" of an excusable cause was held by this court in *San Pedro, Los Angeles & Salt Lake Railroad Co.* v. *United States* (220 Fed., 737).

In the case at bar the record shows an entire absence of any evidence that the train crew involved in counts 7 to 12, inclusive, as to which the defendant pleaded the existence of flood conditions, that the train on which they were employed was in any manner delayed in the course of its journey by reason of the flood conditions as to the existence of which there was allegation and proof. Not only is there an entire absence of any proof that this train was delayed by reason of the flood conditions, but the defendant's answer discloses no allegation that the train in question was so delayed.

Assignment No. 16 in the assignment of errors (Rec., p. 216) is as follows:

> That the court erred in refusing to give the plaintiff's requested instruction No. 10, to wit: "As to counts 7 to 12, inclusive, you are instructed that the heavy rains and unprecedented floods occurring on the dates shown did not excuse the carrier for keeping the employees involved on duty in excess of 16 hours."

This question was duly raised and protected by exception before the jury retired. (Rec., p. 208.)

The refusal of the court to give this requested instruction, coupled with the reference by the court in its charge to flood conditions, constitute error gravely prejudicial to the Government's case.

The admission of evidence as to flood conditions was over the objection of the plaintiff.

When counsel objected that weather conditions alone did not establish a defense, but that it would be necessary to show something happening to the particular train after it leaves the terminal, the court suggested an agreement therewith and said that it would have to be shown that something happened after the train left the terminal, but that the carrier could not prove it all at once. (Rec., p. 189.)

But in the subsequent proceedings no evidence is apparent, as shown by the record, that there was anything happened to this train after it left the terminal which was at all attributable to the flood conditions.

And yet the jury was instructed as follows (Rec., pp. 127–128):

> On this defense, as I have heretofore stated to you, the defendant assumes the burden of proof to the extent that it must prove by a

preponderance of evidence that the storm was of such violence and unprecedented nature that no ordinary and reasonable amount of care would have prevented the delay. Therefore, if the plaintiff has established by a preponderance of the evidence that the defendant violated the hours of service law, as alleged in the complaint, then the burden of the proof is upon the defendant to prove by a preponderance of evidence that the storm in question was of sufficient violence to have caused the delay alleged in the complaint.

The defendant also claims that the retention of the men in service was the result of the track being soft by reason of the floods, and that it could not be foreseen before the men left the terminal that this delay would occur. On that branch of the answer the defendant must also show by a preponderance of the evidence that such was the fact, and that such soft track was a cause not known to the defendant or its officers or agents in charge of such employees at the time the said employees left the terminal, and it could not have been foreseen.

This portion of the charge taken as a whole would seem to give to the jury the impression that if the defendant proves the flood conditions the jury would be justified in rendering a verdict for the defendant, notwithstanding the fact that there was absolutely no evidence on the part of the defendant that the

train in question was delayed or that the excess service was attributable to the flood conditions.

Furthermore, the reference by the court to the flood conditions was not at all limited or restricted as it should have been to counts from 7 to 12, inclusive, but could have been taken by the jury from its general terms to have applied to all the counts in the plaintiff's petition.

The record also shows that the question of the obligation of the carrier to show the causal connection between the flood conditions and the excess service of the employees in question was specifically raised (Rec., pp. 121–122) by the first paragraph of the demurrer to the defendant's second amended answer.

The Government's demurrer to paragraphs 2 and 3 of the defendant's second amended answer to the seventh, eighth, ninth, tenth, eleventh, and twelfth counts in the plaintiff's cause of action for the reason that the facts and statements therein contained are not sufficient in law to constitute a defense for the following reasons:

> 1st. That said paragraphs did not allege that the alleged excess service was the result of the unprecedented rainfall and flood that occurred on the dates mentioned in said paragraphs, to wit, the 19th, 20th, 21st, and 22d days of February, 1914.

According to the record the case proceeded to trial without any disposition made of this demurrer.

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During the progress of the trial the attention of the court was called to this demurrer (Rec., p. 186) and the court said:

> Well, if the demurrer is sustained, I will permit them to amend.

The case thereupon proceeded without further action upon the demurrer, which was neither overruled nor sustained, nor was there any amendment thereafter made which cured the defect as to which this specific demurrer was aimed.

The Government apparently treated the declaration of the court heretofore referred to (Rec., p. 186) as an overruling of its demurrer, and in assignment No. 3 of the assignments of error asserted error in "that the said United States District Court for the Southern District of California, Southern Division, erred in overruling plaintiff's demurrer to defendant's second amended answer." (Rec., p. 214.)

It is respectfully submitted that whether the court rendered final judgment without disposition of the plaintiff's demurrer to defendant's second amended answer, or whether the record is to be interpreted that the District Court overruled plaintiff's demurrer to defendant's second amended answer, in either case the court erred.

> a. The court is not authorized to proceed to final disposition of the case upon the facts, where a demurrer applicable to any portion of the pleadings stands undetermined.
>
> b. If the court had in fact overruled plaintiff's demurrer it erred in so doing for the

reason that it is clear that the defendant's answer does not allege that the excess service involved in the 7th to 12th counts, inclusive, was the result of the rainfall and flood. This conclusion seems to be clear from the decision of this court already cited in the case of *San Pedro, Los Angeles & Salt Lake Railroad Company* v. *United States* (220 Fed., 737).

II.

When the Casualty Proviso is Relied on as a Defense it is Necessary for the Carrier to Show that Compliance With the Obligation to Relieve Employees from Duty was Prevented by the Excusable Cause Relied on.

The duty to relieve employees in train service at the expiration of 16 hours is definitely fixed by the positive terms of the statute itself. Section 2 provides:

> Whenever any such employee shall have been continuously on duty for 16 hours he shall be relieved.

The only limitation placed upon this mandatory provision of section 2 is to be found in the proviso in section 3, upon which the carrier in this case relies. This proviso in section 3 reads as follows:

> That the provisions of this act shall not apply in any case of casualty or unavoidable accident, or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left

a terminal, and which could not have been foreseen.

Reading together the mandatory provision of section 2 and this proviso, it is evident that "whenever any such employee of such common carrier shall have been continuously on duty for 16 hours he shall be relieved," *unless the failure* of the carrier *so to relieve* him is *due* to one of the *causes* specified in the proviso.

It seems to be the contention of the carrier that whenever a train is delayed somewhere on its journey by an unavoidable accident, or the like, such unavoidable delay, regardless of its duration, thereafter relieves the carrier from the mandatory provisions of section 2. Thus interpreted, any casualty or unavoidable accident to a train during its journey operates as a license to the carrier to prolong the hours of service of the employees thereon far beyond the period prescribed by Congress. The Government contends that such casualty or unavoidable accident is not a license to the carrier to require more than 16 hours continuous service of its trainmen, that it has the effect of relieving the carrier from the penalty only in those instances where such accident has a direct or causal connection with the failure of the carrier to relieve the employees at the end of 16 hours. There must be some causal connection between the casualty or accident relied on and the detention of the men of the train crew on duty. The retention of the employees on duty for more than 16 hours must

be the direct and necessary consequence of the casualty or unavoidable accident relied on.

The fact that a carrier exercised proper care to prevent an accident delaying a train does not relieve it from thereafter exercising a proper degree of care to avoid the consequences of such unavoidable delay. It does not seem as though an excusable delay to a train is a license for an inexcusable delay in relieving the employees thereon after 16 hours' continuous service. This so-called "license" phase of the proviso was rejected by the court in *United States* v. *The Southern Railway Company,* Western District of North Carolina, decided October 30, 1913. In that case it was the contention of the carrier that it was entitled to operate a train 16 hours and so much longer as it might be delayed by one of the causes named in the proviso, and without relieving the employees thereon. This is the same contention made by the carrier in the case at bar. On this phase of the question Judge Smith said:

> On that I rule that the occurrence of an accident or a delay by the act of God or any case of casualty or unavoidable accident while the train is in course of transit from one terminal point to another does not mean that the entire act is suspended as to that train. To hold that the entire act would be suspended as to that train would be to hold that the sixteen hours limit did not apply to any train between terminals during the progress of whose transit between terminals any delay occurred from the exempting causes named

> in the statute. The delay might be any number of hours from five to ten, and I hold that the statute does not mean that as to that train the operative period of service is extended from sixteen to twenty-one or twenty-six hours according as some delay from the exempting causes may occur whilst the train is in transit. I construe the statute to mean that the hours of service shall be extended in such cases only so far as may be necessary to permit the train to be operated to a point at which, due regard being had to all the circumstances of the particular case and the character of the train, the train crew could be relieved or be allowed to take the rest required by the statute.

Another case involving the same question is that of *United States* v. *Oregon-Washington R. & N. Co.* (No. 5943), District of Oregon, decided June 4, 1914. The answer of the defendant alleged that the train in question was delayed by certain causes coming within the proviso, "and that by reason of certain delays and not otherwise the defendant required said employees to remain on duty one hour and fifteen minutes in excess of sixteen hours, and but for said delays said employees would not have remained on duty any amount of time in excess of sixteen hours, and would have completed the trip from La Grande to Umatilla in much less than sixteen hours continuous run." To this answer the defendant demurred, and assigned among other grounds the following:

> It does not appear from said answer that defendant made any effort whatsoever to relieve the employee named in any of said causes of action before he had been continuously on duty more than 16 hours.

In sustaining the Government's demurrer, District Judge Bean said:

> In this case the judgment of the court is that this answer does not state a defense. This service act prohibits the company from permitting its employees to remain in service more than 16 consecutive hours, unless it should be due to casualty, unavoidable accident, or the act of God, or when the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the employee left a terminal, and which could not have been foreseen. So I take it the purpose of this statute is to prohibit a railway company from allowing or permitting its employees to remain in consecutive service more than 16 hours unless the reason for the delay comes within the particular exceptions of the statute, and therefore it seems to me that where a railroad company's train is delayed and the 16 hours expire, it is the duty of the company to relieve its employees if it can do so by sidetracking its train, if there is a station where it can be done, and that it can not use the delay as a part of the time necessary to reach one of its terminals; otherwise it might continue the service for an indefinite length of time, so I take it this answer is not sufficient and the demurrer should be sustained.

In the case of United States *v.* Baltimore & Ohio Railroad Company (No. 1710), Southern District of Ohio, decided December 17, 1913, the same question was raised. In his charge to the jury District Judge Sater said:

> The defendant's position, if I comprehend it correctly, is this: That where a delay occurs that is excusable under the law, the train crew may then go forward and complete the journey; go forward until it reaches its destination, although in so doing it may run over the 16-hour period; that the common carrier is not then required to relieve the crew, even if it may do so; that the common carrier has the right to have them complete the journey where a delay has occurred which is excusable, even though the time to complete the journey is in excess of the 16-hour period. Do I state your position correctly?
>
> Mr. DURBAN. Yes, your honor, except that we claim that the statute by its terms says that in that case the act shall not apply.
>
> Mr. KING. And provided that the period of the excusable delay equals the period of the excess or the overtime; that is admitted in this case.
>
> The COURT. That is the position of the defense as their interpretation of the law.
>
> The Government takes a different view. Its view is that even though a delay excusable in law has occurred, after it is over and the train proceeds the carrier is not excused for working the men or permitting them to work beyond the 16-hour period, or further beyond

the 16-hour period than is necessary to relieve them.

This is the Government's position, if I understand it rightly, viz, that men may not be held to their work or permitted to continue it after the 16-hour period a longer time than is necessary to relieve them.

If I understand its position, it is this: Suppose a crew starts on a run that will take 12 hours. It is out 2 hours. A delay occurs which is excusable in law. Suppose it is held there 9 hours; they would have 10 hours more service if they should complete the whole trip. If they remained on duty to the end of the trip they would put in 21 hours of work. Now, if I understand the defendant's position, it is that they would have the right to go forward and complete that trip although it might take them 21 hours. The Government's position is that the law does not mean that. The defendant's position is that the law would not apply to that kind of a case. The Government's position is that it does apply and that it does not intend that the men shall work beyond the 16 hours, if they can be reasonably relieved, and, if they reach a point at which they may be thus relieved, it is then the duty of the carrier to relieve them. We have not had this question decided by the higher courts. I have concluded that the position of the Government is correct, and that what the law means is that where a delay has occurred the crew may go forward operating the train, but that it can not be held in service without violating the law (if the 16-hour period has ex-

> pired) if a suitable stopping place should be reached at which it may be relieved; and that if such a place is reached and the crew is not relieved, that then there is a violation of the law and the carrier becomes responsible; that it is a carrier's duty to provide in such emergencies at suitable places for persons to relieve men who have served the full statutory period or more on account of some delay which may have arisen.

Compliance with the obligation fixed by the words of section 2 to the effect that "whenever any such employee of such common carrier shall have been continuously on duty for 16 hours he shall be relieved," etc., is absolutely and mandatorily required unless excused by either of the provisos in section 3.

The obligation of the carrier to relieve has been considered by this court in three cases: *Great Northern* v. *United States* (211 Fed., 309, certiorari denied, 34 Sup. Ct. Rep., 776); *Northern Pacific Railway* v. *United States* (213 Fed., 577); *San Pedro, Los Angeles & Salt Lake Railroad* v. *United States* (220 Fed., 737).

Compliance with this duty to relieve seems also to be sustained by the decisions of the Eighth Circuit Court of Appeals in *San Pedro, Los Angeles & Salt Lake Railroad* v. *United States* (213 Fed., 326), and *Great Northern Railway Company* v. *United States* (218 Fed., 302).

Other cases establishing this duty to relieve are *United States* v. *Atchison, Topeka & Santa Fe* (236 Fed., 154); *Denver & Rio Grande Railroad Company* v. *United States* (233 Fed., 62).

In Denver & Rio Grande Railroad Company *v.* United States, 233 Fed. 62, 8th C. C. A., Amidon, District Judge, delivering the opinion of the court said:

> A carrier must use diligence to anticipate, as this court held in United States *v.* Kansas City Southern Railway Company (202 Fed. Rep. 828), "all the usual causes incidental to operation." And *when any casualty occurs the carrier must still use diligence* to *avoid* keeping its employees *on duty overtime.* Failure to perform either of those duties deprives it of the benefit of the proviso. [Our italics.]

And again in the same case:

> We do not think it was the intent of Congress in case of such serious matters as derailments and collisions to take from the company the protection of the proviso even if such events were caused by the negligence of the company or its employees. On the other hand, it was the intent of the statute in case of such an event to leave the company free to deal with the situation and to retain employees in the service *if that result could not be avoided by the exercise of reasonable diligence after the occurrence of the accident.* [Our italics.]

In the case of Great Northern Railway Company *v.* United States, 218 Fed., 302, 8th C. C. A., the court said:

> In other words, the proviso in section 3 of the act *does not relieve* the officials in charge of train crews *from exercising proper diligence*

> *to avoid working them overtime,* and proper diligence requires train officials to know whether or not engines and cars are in proper condition for use when starting them upon a run. [Our italics.]

In the case of Northern Pacific Railway Company *v.* United States, 213 Fed., 577, 9th C. C. A., a case where the defense set up was that firemen were held on duty more than 16 hours, the rest of the train crew being released from duty in a case where the train was tied up at a way station by reason of a storm and snowfall of such unusual and unprecedented violence that when it arrived at the station of Avon the telegraph and telephone lines of the company were down in both directions, destroying all means of communication with the operators and dispatchers of the company along the portion of its line here in question; that in consequence of the impossibility of proceeding with the train in such circumstances that train was left at Avon, the crew released from duty, and the fireman placed to watch and guard the engine on a side track. In that case the court said:

> That the present case does not come within either of the provisions of the act declaring that it 'shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen'—is obvious, if for no other reason, because the uncontradicted evidence,

> as well as the answer of the defendant company itself, shows that each of the trains in question was stopped by direction of the railroad company, side-tracked, and their respective crews laid off for rest within 16 hours from the time they left Missoula for the very purpose of complying with the said statute, excepting only the two named firemen, who were continued at a duty which the company claims was not within the inhibition of the law; *the mistake made was its own mistake in continuing one of* each of the crews—the fireman—at the duty of watching the engines. [Our italics.]

In the case of San Pedro, Los Angeles & Salt Lake Railroad Company *v.* United States, 220 Fed. 737, 9th C. C. A., Ross, Circuit Judge, delivering the opinion of the court, said:

> To hold that the act under consideration is made inapplicable by any and every delay that is the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the latter leaves a terminal, and which could not have been foreseen, would be nothing short of making it a dead letter. Manifestly the whole act must be taken together and be so construed as to give effect to its humane purpose and at the same time to give the railroad companies the benefit of the exceptions and provisos in all cases fairly brought within their terms and true intent. There can be no doubt that the paramount purpose of the act was to prevent the overworking of the employees, to the end that their efficiency be not impaired, and that the

obligation was thereby imposed upon the carriers to comply with that requirement, unless prevented therefrom because of a valid excuse, secured to them by the provisos and exceptions contained in the act, which was not made effective within the usual time, but its going into effect postponed for one year, the purpose being, as said by the Supreme Court in the case of *Northern Pacific Ry. Co.* v. *Washington*, 222 U. S. 370, 379, "to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act." It would seem to follow necessarily that in order for the carrier to justify the excess of service beyond the fixed period prescribed by the act it must show that the same was not in any respect occasioned by the lack of that high degree of care and foresight properly required of the carrier, but was the direct result of an act of God, a casualty, unavoidable accident, or of delay that was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the latter left a terminal and which could not have been foreseen.

In the very recent case of *Great Northern Ry. Co.* v. *United States*, decided October 28, 1914, by the Circuit Court of Appeals of the Eighth Circuit, that court expressly held, among other things, that the proviso in section 3 of the act under consideration—

Does not relieve the officials in charge of train crews from exercising proper diligence to avoid working them overtime, and proper diligence requires train officials to know

whether or not engines and cars are in proper condition for use when starting them upon a run."

As under the evidence there can be no doubt that the landslide was the direct and necessary cause of the detour of the train in question and of its numerous delays, and that therefore the defendant company was entirely justified in continuing in service its train crew up to the time it could, with the exercise of proper diligence have relieved it, it is plain that the action of the court below in directing a verdict for the plaintiff on counts 3, 4, and 5 must have been based on the view that the defendant company had the opportunity to relieve that crew either at San Bernardino or Daggett, or both, and was by the statute, properly construed, required to avail itself of it; in which view we think, for the reasons already stated, the court was right, being unable to agree with the learned counsel for the defendant company that by the adoption of the first proviso to the third section of the act—

"It was the intention of Congress to permit a crew starting from a terminal to remain with the train overtaken by delay, casualty, or unavoidable accident until the end of the run."

In the case of Atchison, Topeka & Santa Fe Railroad Company *v.* United States, 220 Fed., 748, the court said:

It appears from the stipulated facts filed in the court below that the employees of the

plaintiff in error were employed as conductor and brakemen, respectively, on one of the trains of the plaintiff in error running between Parker, Ariz., and Los Angeles, Cal.; that the employees went on duty at Parker, Ariz., at 10.40 p. m. on October 2, 1912; that the train on which they were employed left Parker at 11.10 p. m. of that date and arrived at Barstow, Cal., at 7.10 a. m. on October 3, 1912, having been delayed between the two points for a period of 2 hours and 30 minutes on account of washouts; that the train left Barstow, Cal., at 7.45 a. m. on October 3, with ample time then remaining to reach Los Angeles within less than 16 hours from the time the employees entered upon their duties, but while the train was being operated between Barstow and San Bernardino an axle broke under the tank of an engine, whereby the movement of the train was unavoidably delayed for a period of 6 hours and 10 minutes, with the result that the train reached San Bernardino at 5.30 p. m. and Los Angeles at 8.25 p. m. on October 3, the employees having then been on duty for 21 hours and 45 minutes; that before the delay of 6 hours and 10 minutes caused by the broken axle had expired, and before the damage which had caused the delay had been repaired, and before the train left the point where such delay occurred, it was known to the plaintiff in error that its employees would have been on duty in excess of 16 hours by the time the train reached San Bernardino; but no effort was made to relieve the employees before they

had been on duty in excess of 16 hours, either previous to or at the time of their arrival at San Bernardino, or at any time before the employees reached Los Angeles; that San Bernardino was a division terminal, but was not a terminal for the employees of the train involved in this proceeding, but the employees of the plaintiff in error could have been relieved at that place and the train placed in charge of another crew.

The position taken by the plaintiff in error is, that the facts above set forth constitute no violation of the statute for the reason that the terminal of its train was Los Angeles and it was entitled to permit its employees to be and remain on duty until that terminal was reached, regardless of whether the 16-hour period prescribed by the statute had expired. The Government's contention is that where delays have occurred the employees may continue to operate the train, but that they can not be held in service beyond the 16-hour period prescribed by the act if a suitable stopping place should be reached at which they may be relieved, and that if such a place is reached and the enployees are not relieved, there is a violation of the law.

The position taken by each of the parties in the present action, and the arguments advanced in support of those positions, are in all substantial respects identical with the positions and arguments of the parties in the case of *The San Pedro, Los Angeles & Salt Lake R. R. Co.* v. *U. S.*, 220 Fed., 757, decided by this court on February 1, 1915. On the authority

of that case the judgment of the court below is affirmed.

In the case of *United States* v. *Atchison, Topeka & Santa Fe* (236 Fed., 154), District Judge Bean said:

> The statute therefore *not only* imposes upon a carrier what might be denominated a *negative obligation*, forbidding it from requiring or permitting an employee to remain on duty, but imposes an *affirmative duty to relieve* such employee after 16 hours of consecutive service, unless it is *prevented* from doing so by some of the matters specified in the proviso in the statute. Now, the manifest purpose, as I see it, of this statute, was to absolutely prohibit a carrier from requiring or permitting an employee to remain on duty longer than the time specified therein, and to require it to relieve such employee at the expiration of such time unless its delay in doing either of these things comes within the proviso of the statute and was due to one of the causes specified in the exception. In other words, as I understand the statute, the carrier is exempt from liability for excess service when, in case of casualty, unavoidable accident, the act of God, or any other matter specified in the proviso, it necessarily requires or permits an employee to remain on duty beyond the time specified.
>
> Now, therefore, it appears that the train crew has been on duty more than 16 hours consecutively. It is incumbent on the carrier to show by proof that the excess time could not have been prevented by it by the exercise

> of that high degree of care in the matter of its equipment, the operation of its road, consistent with the purposes to be accomplished by this act and the practical operation of the road. And, as I understand the statute and construe the decision of the Court of Appeals of the Ninth Circuit, and especially in what is referred to as the *Salt Lake case* (220 Fed., 737), the carrier is required to relieve the crew at the expiration of 16 hours or as soon thereafter as it can do so by the exercise of the degree of care to which I have alluded. I suppose that it could continue the service so far as might be necessary to permit the train to be operated to a point, having due regard to all the circumstances and surrounding facts, where the train crew could be relieved or allowed to take the rest required by the statute; but I do not understand that it may permit or require an employee to continue to the end of his run, although but for some delay due to a matter referred to in the proviso or covered by the proviso in the statute, he would have been able to complete the run within the time specified.

The latest judicial expression upon the question here under consideration is in the case of *United States* v. *Baltimore & Ohio Railroad Company,* in which Clarke, district judge, now Mr. Justice Clarke, in the District Court of the United States for the Northern District of Ohio, December 2, 1915, charging the jury, said:

> My construction of the law is, and I charge you that it is the law of this case, that it was

the duty of the defendant to exercise a very high degree of effort and diligence, having regard to the means of conveyance employed and to the circumstances surrounding the transportation of the train on the night in question to have its cars in good order before train No. 97 started on its journey; and also, if, in the course of its journey, *through casualty or unavoidable accident, or the act of God,* or as the result of a cause not known to the company, or any of its agents in charge of the crew of the train, any delay occurred, that then the company *could not lawfully simply add this delay to the 16 hours* which it might keep its crew on duty, but that when such a delay from such a cause arose *it became the duty* of the defendant railroad company *to exert itself in a highly energetic and diligent manner* to either get its train through to its intended terminal within the 16 hours allowed by law or *to make arrangements to have the men of the crew relieved at the expiration of that time.*

There are several ways in which this might be done. A train too heavy to make the necessary time under the conditions existing could be divided and a part of it left at some available siding. There is no evidence in this case that there was not such a siding available somewhere between Newark and Shelby Junction; or the entire train might be sidetracked until a new crew arrived to take it forward, keeping within the requirements of the law with respect to service.

> I am not saying to you that it was possible to do any or all of these things in this particular case, but I do say that it was the legal duty of the defendant company to exert a high degree of energy and diligence to avoid keeping the crew of this train, No. 97, on duty a longer period of time than 16 hours, either in the ways I have suggested, or in some other way which may suggest itself to you. [Our italics.]

While the case of Chicago & North Western Railway Company *v.* United States, 234 Fed., 268, arose under the "Twenty-eight hour law" the reasoning therein is clearly applicable and is a conclusive answer to the contentions of the carrier made in its brief. In that case it was contended by the carrier that a delay of 2 hours and 52 minutes occurring through a pulled drawbar and consequent derailment of a car, and another delay of 28 minutes through a bursting air hose and resultant pulling out of another drawbar, making three hours and twenty minutes of excusable delay, operated to authorize the prolongation of the transportation without unloading to the extent of the time covered by these delays. In that case the court, at p. 270, said:

> The statute prohibits the carrier from confining the stock beyond the period fixed, without unloading into pens, etc., 'unless prevented by storm or other accidents or unavoidable cause which cannot be anticipated or avoided by the exercise of due diligence and foresight.' If the unloading is so prevented, the delay is excused; but if, notwithstanding

unanticipated and unavoidable delays, the carrier ought nevertheless in the exercise of reasonable diligence to have unloaded the stock within the prescribed time, the delay will not relieve it from liability for confinement beyond that time. Delay in transportation may or may not necessarily delay the time of unloading, depending upon the facts of each case. Suppose an instance where, the shipper having consented to 36 hours' confinement, the time reasonably required to convey the stock from origin of shipment to unloading point was 10 hours, and that an excusable delay of 16 hours occurs in transportation, would this excuse the carrier in prolonging the confinement of the stock beyond the 36 hours? Plainly not, if in the exercise of due diligence the confinement, notwithstanding the delay, should not have exceeded 36 hours. In other words, since there were still 20 hours of the 36 in which to do what reasonably required but 10, the overtime of confinement would not be attributable to the delay in transportation. *And surely the delay of 16 hours in the transportation would not in and of itself give the carrier the right arbitrarily to prolong the confinement from the original 36 to 52 hours*, wholly regardless of the time reasonably necessary to reach an unloading point, without incurring the penalty of the statute, if the confinement is willfully and knowingly extended beyond 36, though within 52 hours.

So in the instant case, if conceding 3 hours 20 minutes of excusable delay at Proviso and

> Brighton Park, the jury nevertheless found from the evidence that the confinement of the stock in question ought not, in the exercise of due diligence by the carrier, to have exceeded the 36 hours, or, if exceeding 36, ought not to have been as long as 39 hours 5 minutes, its verdict would in that regard be justified. [Our italics.]

III.

MAY THE PERIOD OF 16 HOURS' DUTY OF A TRAIN CREW BETWEEN TERMINALS BE EXTENDED BY A CARRIER BY GIVING TO SUCH CREW SHORT RELEASES NOT EXCEEDING AN HOUR AND A HALF TO COVER THE TIME IT IS FORESEEN THAT SUCH CREW MAY BE DETAINED AT A WAY STATION FROM ANY OF THE USUAL CAUSES OF RAILROAD OPERATION?

Not every brief intermission from active work breaks or interrupts the continuity of time "on duty." Such a period of release must be of sufficient duration to really afford relaxation from the strain of service.

This court in *United States* v. *Northern Pacific Ry. Co.* (213 Fed., 539), said:

> No doubt in extreme cases the court may declare as a matter of law that a given period is so short as not to break the continuity of the service.

The brief period of intermission from active service in this case in no instance being more than an hour and a half afforded no substantial opportunity for rest. The time involved was so short that they were

"trivial interruptions" and not of sufficient duration to afford substantial rest.

Cases involving such short releases of service are: *United States* v. *Chicago, Milwaukee & P. S. Ry.* (197 Fed., 624–627); *United States* v. *Denver & Rio Grande R. Co.* (197 Fed., 629); *United States* v. *Oregon Short Line Railroad Company*, in the District Court of the United States for the District of Utah (not officially reported).

Brief interruptions such as time necessary for meals while on the road, meeting trains, waiting for orders, delays on account of the congestion of traffic or while waiting for an engine or for local switching can not be considered time off duty, although during such periods of detention no active service was required of the employee. It is clear that such brief intermissions do not afford reasonable opportunity for rest and recreation.

It is clear in the case at bar from the evidence in the record that the release is not one given to the employees for the purpose of giving them an opportunity for rest, but is merely given to cover the delay at Colton in order that local switching might be done there for the purpose of prolonging the period of the service of the employee and postponing the time of his final release.

In the case of *United States* v. *Minneapolis & St. Louis Ry. Co.* (236 Fed., 414), District Judge Wade held that under ordinary circumstances two hours or 2 hours and 20 minutes is not a period of "substantial rest" or an "opportune period" of rest.

In that case the court said:

> Sixteen hours' continuous service is a long service in such work. The employees in this case were out upon their trip 17 hours and 40 minutes, 17 hours and 15 minutes, and 17 hours and 55 minutes, respectively; out of 24 hours there was less than 7 hours left. The periods of release in the very nature of things could not be periods of "substantial rest."

When in conjunction with the brevity of the release it is considered as this court said in *Northern Pacific Ry. Co.* v. *United States* (220 Fed. 108), that

> The run of the crew was not ended; it remained the crew of the train, temporarily relieved because of delay.

that they were subject to call; that they were paid for the time covered by the delay; that there was in fact no substantial rest; that while the employees got lunch and walked about the yards and station and sat in the caboose, there is no contention that in fact they secured any substantial rest, it is so evident and clear that there was no substantial and opportune period for rest according to the test laid down by this court, that the request for an instructed verdict for the plaintiff should have been complied with, and a peremptory instruction in accordance therewith given to the jury.

IV.

A Release for an Indefinite Period Under the Circumstances Involved did not Effect a Break in the Continuity of the Service.

This question arises by reason of the refusal of the trial court to give the instructions requested by the plaintiff and made the basis of the assignments of error 12 to 15, inclusive.

The testimony relative to the nature of the releases given to the employees at Colton presented to the jury the questions as to whether such releases were for a fixed and determined period. It is submitted that a consideration of all the evidence leads irresistibly to the conclusion that the releases were indefinite as to time, but, viewing it in the light most favorable to the defendant, if the question was left for the jury's determination, the instructions requested by the plaintiff should have been given. If the crews did not know when they would be needed and were waiting, although inactive, still they were on duty within the meaning of the statute involved. The courts are unanimous as to the proposition that where a release is for an indefinite period, and given under circumstances such as existed in each of the instances at Colton, such release does not break the continuity of the service. *M. K. & T. Ry. Co.* v. *United States* (231 U. S. 112); *Southern Pacific Company* v. *United States* (222 Fed. 46); *United States* v. *C. M. & P. S. Ry. Co.* (197 Fed. 624); *United States* v. *D. & R. G. R. R. Co.* (197 Fed. 629); and

United States v. *P. R. R. Co.*, decided by Orr, district judge, for the Western District of Pennsylvania, December 24, 1915 (not yet reported).

This court in the *Southern Pacific case* (222 Fed. 46), did not hold that if the release was for an indefinite period it still remained a question for the jury to say whether under the circumstances there was a substantial and opportune period for rest. To have so held would have been contrary to the decisions cited with approval, one of which was the *M. K. & T. case*, *supra*, decided by the Supreme Court of the United States. It is to be observed that the cases referred to as being within the twilight zone are those where the releases are for a definite period, and that where the release is for an indefinite period the court may as a matter of law find or direct a jury to find that while so released the crews are on duty and, as said by the Supreme Court, "Their duty was to stand and wait."

A release for an hour and a half, "or until called" is as indefinite in its duration as a release *until* called.

The apparent definiteness of the fixed period becomes entirely indefinite when qualified by the alternative "or until called."

As a whole the release from duty is coupled with the obligation to be ready to resume service whenever the requirements of the carrier made it advisable to call upon the employees for service. The court by its quite full reference in the former Southern Pacific case to the decision of District Judge

Rudkin, District Judge Pope, and the case of *Missouri, K. & T. Ry. Co.* v. *United States* (231 U. S., 112) clearly intended to point out the necessity of a release for a fixed and determined period of time to break the continuity of service.

That the opinion of this court was so intended was the interpretation given to it by District Judge Sawtelle when that case was retried in the district court. In charging the jury he said:

> A release, even though bona fide, in order to remove the employee from the application of the law for the time covered by such release, must be for a definite period. The mere wording of the release may not alone be a sufficient guide as to its character and purpose, though it may be considered, and in considering the question of whether such release was for a definite period, the jury may look at all the surrounding circumstances, the place of the release, the real purpose or object sought to be attained, and particularly the right of the company to cancel such release, if they retained such right, before its termination. Such release must be definite and certain as to the period of time, and substantial and opportune as to the period of rest; otherwise, the duty is a continuous one.
>
> If you believe from the testimony that the so-called releases at Bowie were given for the purpose of extending the time of the crew with relation to the 16-hour period, and that during the period of such releases the members of the crew were expected to hold themselves available and in readiness to proceed toward

> their destination at Benson as soon as circumstances would permit, you are instructed to find for the Government as to each of the six counts of the declaration or complaint.

The opinion of this court in the *Southern Pacific Company case* was recently cited by District Judge Wade in the case of *United States* v. *Minneapolis & St. Louis Railroad Company* (236 Fed. 414), as authorizing the construction that the release of the employee must be *definite* and *certain* as to the period of time. In that case the court said:

> After a careful study of all the cases I am content to adopt the conclusion in *Southern Pacific Co.* v. *United States* (Ninth Circuit, 222 Fed. 46), which recognizes the rule that there may be "intermissions" of such period and under such circumstances as to break the continuity of the service. In this case it is held, and in my judgment properly held, that whether these intermissions are such as the law will recognize depends upon their character as periods of substantial rest.
>
> It is also held "*that the release of the employee must be definite and certain* as to the period of time and substantial and opportune as to the period of rest. A release for meals or to stand and wait for another train is not sufficient. There must be a substantial and opportune period, otherwise the duty is a continuous one." * * *
>
> I am not prepared to hold that an absolute release for a period of two hours at a time other than at mealtime would not be such a period as might be considered "substantial

> and opportune" for rest. No arbitrary period can be fixed. The circumstances must determine. Sixteen hours' continuous service is a long service in such work. The employees in this case were out upon their trip 17 hours and 40 minutes, 17 hours and 15 minutes, 17 hours and 15 minutes, and 17 hours and 55 minutes, respectively; out of 24 hours there was less than 7 hours left. The periods of release in the very nature of things could not be periods of "substantial rest." Rest is largely psychological. The circumstances must be such as to induce rest. The problem is not solved by saying that the men could have gone to bed and slept for an hour, or 1 hour and 20 minutes, aside from the time they were at their meals. We are dealing with human nature. The public is interested in actual rest—not in opportunities for rest—and while I realize that the employer can not be held responsible for failure of employees to rest when the opportunity is given them, yet I feel that the opportunity, to be "substantial and opportune," must be under such circumstances that the average employee will in fact rest. [Our italics.]

And that this is the true rule of law seems to be clear from the citation with apparent approval in *Missouri, K. & T. Ry.* v. *United States* (231 U. S. 112); of the case of *United States* v. *Chicago, M. & P. S. Ry. Co.* (197 Fed. 624), in which Judge Rudkin said:

> If a railroad company may relieve its employees for service during meal hours, it may

> also relieve them from service every time a freight train is tied up on a siding and *thus defeat the very object the* legislature had in mind.

and the case of *United States* v. *Denver & R. G. R. R.* v. *United States* (197 Fed. 627).

In the case of *Pennsylvania Railroad Company* v. *United States*, in the District Court of the United States for the Western District of Pennsylvania (not reported), in an opinion filed December 24, 1915, Orr, district judge, said:

> There are 10 separate causes of action in each of which the defendant is charged with permitting an employee to remain on duty longer than the period fixed by the act. In each cause of action during the period of employment therein stated there appears to have been granted to the employee a period of relief from the performance of work. If the period of relief in each case had been from the performance of duty, as well as a period of relief from the performance of work, there might have been no violation of the act, because the excess service charged in each case did not equal the period of relief. The period of relief, however, was a period in which the employee was required by rule to be subject to call. In other words, during such period of relief the employee was not free to go where he pleased, or do what he pleased, because he was under the duty of remaining within call when needed for further service. Such periods of relief varied, in the cases now under consideration, from 35 minutes to 2 hours and more. At certain places where periods of

relief were granted, the employees were required to remain in the rest house or bunk room, and at another place where there was no rest house or bunk room, they were required to state where they could be found when needed. During these periods of rest none of the employees were required to have supervision over engines, cars, or other instrumentalities of travel. The system by which these periods of relief were granted and the men controlled during the same, was apparently adopted by the company in good faith and without any attempt to evade the provisions of the statute. The services required of the men upon duty may be included in the term "pusher" services; that is, the assisting of other trains which by reason of the loads being hauled, or the condition of the engines, needed additional assistance in the shape of motive power. When such pusher services would be required could not reasonably be definitely anticipated. The trips required were comparatively short, and therefore quite often repeated. The difficulties in properly arranging such service is no excuse for the violation of the law, and yet should be taken into consideration in fixing the penalties for such violation. The railroad company seems to have acted in good faith and without harshness to its employees, because the periods of relief appear to have been longer than the excess service. However, such periods of relief, to be credited upon total service, should have been periods of freedom instead of periods of restraint.

The assistant superintendent of the Southern Pacific Co. at Los Angeles who had supervision over these trainmen testified that under the system applicable to these employees they were released at Colton "until they were called to leave." * * * "The release was for an indefinite period." * * * "They are paid for every minute they are at Colton. That is between terminals. That is because they had not reached their destination. The release at Colton differed from the releases at their terminals in this: At Colton they are in the middle of their run. At their terminals they are at home." (Rec., p. 182.)

"The stops at Colton are made to arrange the trains for continuing on from that point." (Rec., p. 184.)

Under such circumstances the plaintiff would seem clearly to have been entitled to the instruction requested that if the jury should find that the releases were not for a definite and fixed period they did not operate to break the continuity of service.

V.

Such releases between terminals are not to be regarded as time off duty where employees are paid for the time covered by such release.

The evidence discloses that the time covered by the releases in question here was time paid for by the carrier, "every minute" of it.

In explaining why it was paid for by the carrier the witness, one of the officials of the company, explained

clearly that there was a difference between a release of the character here in evidence and a release at the final terminal. This explanation makes clear the ruling of this court in a former case. "They were still the crew of the train temporarily relieved because of delay."

In the payment of the men it is evident in the case at bar that all the time of a train crew on its run between terminals including time of delays and intermissions covered by the releases in evidence was for the purpose of the payment of wages regarded as time "on duty."

If the relations between the crew and the carrier were such that under their contract of service payment for the time covered by such intermissions was due and made therefor, it is reasonably presumable that the time was company time and was time "on duty."

Time paid for by the carrier belongs to the carrier and is therefore not a time of freedom but of obligation.

Time during which employees are "subject to call" and for which employees are paid is time on duty within the meaning of the act, when considered together with the brevity of the so-called release periods; the fact that the release covered a period of detention of the train from the ordinary occurrences of railroad operation; that one of its purposes was to enable the carrier to extend the time of the final release from duty and that it occurred while the em-

ployees still remained the crew of the train which was, though temporarily delayed, still in the course of its journey to its ultimate destination.

VI.

Where Conditions Resulting from a Cause Covered by the Casualty Proviso Are Known When a Train Leaves a Terminal, Excess Service of the Crew of Such Train Can Not Be Justified Under That Proviso.

When a train starts out from a terminal after all conditions resulting from a cause justifying excess service under the casualty proviso are known, the carrier then has full opportunity to make such arrangements as will prevent the train crew from remaining on duty longer than 16 hours.

If delay of a train was the necessary result of the *conditions known*, such result could readily be foreseen.

Such delay was the result of a cause known to the carrier before the employees left a terminal and could have been foreseen.

This question was before the Eighth Circuit Court of Appeals in *Denver & Rio Grande Railroad Company* v. *United States* (233 Fed. 62). In that case the court said:

> Counts 6 to 10 involve the crew in charge of a train from Helper to Salt Lake City, a distance of 114 miles. Before this trip was entered upon an accident had occurred to another train, involving the derailment of 14

cars. Defendant's train dispatcher knew of this accident before the train here involved left Helper, and directed it not to leave that point until further orders. About that time he received telephonic advice from the conductor of the wrecked train that the track would be cleared for traffic within 20 or 30 minutes after the arrival of a derrick. A derrick was sent forthwith from Helper, arriving at the scene of the derailment about 7 a. m. The train dispatcher, relying on the advice given him as to the time it would take to clear the track, ordered the train in question to leave Helper for Salt Lake City at 6.30 in the morning. He did this without waiting to see what time would be necessary to clear away the wreck. Much more time was, in fact, consumed than was anticipated, and when the train approached the point where the wreck occurred it was detained, and this caused the keeping of the crew on duty for a longer period than 16 hours. The point at which the derailment occurred was only 6 or 7 miles from Helper, and telephonic communication existed between the points. No reason is shown why the train was ordered to leave this terminal before the derrick had actually arrived at the scene of the wreck and some progress had been made in removing it. There was no excuse for acting on first impressions as to the time that the line would be obstructed. In our judgment, therefore, the trial court was right in directing a verdict in favor of the plaintiff as to these counts.

In the case of *United States* v. *Great Northern Railway Company* (220 Fed. 630), the Seventh Circuit Court of Appeals said:

> Looking at the proviso as a whole, and with the intent of leaving, if possible, vitality in all its parts, we conceive that Congress said to the railroads: You need not pay penalties for violations in the following instances:
>
> Act of God—You are excusable for delay caused by violence of nature in which no human agency participates by act or omission. For example, a washout due to an unprecedented flood *that was not and could not reasonably have been anticipated.*
>
> Unavoidable accident—You are excusable if at the time and place of the accident that caused the delay you, through your employees, were in the exercise of due care. For example, a switch tender falls dead at an open switch and a collision immediately follows without anyone's fault.
>
> Last clause of the proviso—Explanatory of unavoidable accident. But you are not excusable *if at the time a train leaves a terminal you,* through your inspectors, either *knew* or, by the exercise of due care, *might have foreseen* a cause that would be *likely* to produce an accident and *consequent delay.* [Our italics.]

In the case of *United States* v. *Missouri, Kansas & Texas Railway Company of Texas* in the District Court of the United States for the Eastern District of Texas, decided May 30, 1912 (not reported), Russell, district judge, in the course of his charge to the jury said:

> Another excuse offered is that the train was delayed three hours in order to go from Royce City to Greenville for water, and it was stated that there had been in this country a very great scarcity of water for quite a while, and it appears that the only water station at which the supply could be replenished after leaving Dallas was Greenville. The defendant company knew that fact, knew there was no water at Royce City, and that the engine could not procure water anywhere after leaving Royce City, and that the engine could not procure water anywhere after leaving Dallas until it reached Greenville, and, therefore, if one water car was not sufficient they should have attached two, or whatever number was necessary, to supply the engine until it reached Greenville, and I do not think that excuse falls within the proviso attached to the act.

(This was the case finally affirmed by the Supreme Court of the United States, 231 U. S. 112.)

The general tenor of the decision in *United States* v. *Atchison, Topeka & Santa Fe Railroad* (212 Fed., 1000), is not supported by this court in a later case between the same parties, but Judge Sawtelle in his opinion in that case properly excepted from the application of the proviso instances "in which the officers or agents in charge of the employees knew, or could have foreseen, the existence of the cause of the delay at the time such employee left the terminal or starting point" (p. 1006).

There is, under circumstances where a train leaves a terminal after casualty conditions are known, ample opportunity to prevent the excess service to relieve the crew.

Train service need not be abandoned. A sufficiency of men either on the train or at available points on the road will avoid excess service even without tying up the train at some intervening side track. Though as to freight trains under ordinary conditions even the latter course is preferable to working the crew beyond 16 hours.

CONCLUSION.

The refusal to give the instructions requested by the Government was error. The plaintiff was entitled to a peremptory instruction because (1) no causal connection was shown between the flood conditions and the detention on duty of the train crew; (2) the time of service of the train crew was extended by short releases during which this crew was subject to immediate recall if required by the carrier and was paid the same as during the indisputable "on duty" periods; (3) during all the time covered the train crew in each instance remained jointly the crew of its train temporarily detained but charged with the duty of continuing the run of the train, when ready, to its final terminal; and (4) all the conditions resulting from the flood were known before the train involved in counts 7 to 12, inclusive, left its initial terminal, and excess service, if any resulted therefrom, could have been foreseen.

The judgment should therefore be reversed and a new trial ordered.

Respectfully submitted.

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